SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1974
No. 74-529

ISAAC JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

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ISAAC JOHNSON,
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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Isaac Johnson, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on September 20, 1974, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The opinion and journal entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is attached hereto as Appendix "A", *infra,* at page A1. The journal entry of that court denying rehearing is Appendix "B", *infra,* at page A9. The judgment entries of the Supreme Court of Ohio denying further appellate review are Appendices "C" and "D", *infra,* at pages A10 and A11. The journal entry of the Common Pleas Court (the trial court) is Appendix "E", *infra,* at page A12.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on September 20, 1974. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTIONS INVOLVED

1. Where the essential aspects of the State's case, in a narcotics prosecution, rests exclusively on the testimony of an addict-informer-witness (who was not only an addict both at the times of all the occurrences asserted in his evidence and at the time he testified, but whose testimony was further conditioned by being specifically advised that serious charges that had been recently dismissed against him could be revived), is the defendant entitled as a matter of due process to have the jury given cautionary instructions as to the inherent unreliability of testimony from witnesses of this ilk?

2. Is the due process requirement of proof beyond a reasonable doubt satisfied where the sole evidence upon which a guilty verdict is based is the uncorroborated testimony of an addict-informer-witness, who sought out the police to be an informer after having been indicted for selling narcotics directly to a police officer while on probation for other serious charges, which charges were conditionally dismissed inferentially in exchange for such witness' testimony?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States, Amendment XIV, Section 1, Clause 2:

> * * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *.

Ohio Revised Code, Section 3719.20(A):

> No person shall possess for sale a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code.

Ohio Revised Code, Section 3719.20(B):

> No person shall sell a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code.

STATEMENT OF THE CASE[1]

Isaac Johnson, the petitioner herein, was convicted, in Case No. 6441, for three alleged violations of the State's Narcotic Drug Law. In Case No. 6442, he was convicted on two additional charges. These cases were combined for trial on the State's motion.

More specifically, the charges were (in Case No. 6441) that on August 16, 1972, the petitioner sold a quantity of heroin and on the same date he possessed a quantity of heroin for sale. Count 3 of this indictment was that on August 18, 1972, he possessed for sale an additional

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1. Whenever reference is made in this petition to the record in the trial court it will be preceded by the prefix "R".

quantity of heroin. The charges in the other case (No. 6442) were that on September 5, 1972, Isaac Johnson sold and possessed for sale a quantity of heroin.

Following his conviction on all counts, petitioner was sentenced to the Ohio Penitentiary. The appeal on questions of law from the judgment entered on those verdicts, resulted in affirmance by the Court of Appeals. The Supreme Court of Ohio denied leave to appeal. This action is a result of the judgment of the Ohio Court of Appeals.

STATEMENT OF FACTS AND EVIDENCE

I

George Randle, an admitted addict (both at the time of the occurrences asserted in his evidence and at the time of his testimony) as well as, an obvious perjurer, testified that on the various dates alleged in these cases he was involved in narcotics transactions with Isaac Johnson.

The veracity of his testimony, which will be discussed in great detail herein, must be measured against facts showing basic segments of his evidence to be complete fabrications. In this regard, the record shows George Randle *first* testified that he had "been working with . . . [the narcotics detectives in this case] for about the last two years, two and a half years" (R. 7), and that he came to know them when he was arrested for "suspicion of drugs" (R. 35).

Next, it was his testimony, on direct examination, that he had never "been convicted of a state or a federal offense." This contention the State had Randle emphasize

by responding to a direct question which asked him if he had "a conviction of any type, whether it be a state offense or federal offense anywhere in this country" (R. 36). As to this question, Randle's unambiguous answer was, "No, I haven't been convicted of an offense—of a crime" (R. 36).

As opposed to the above deliberate perjury, for which Randle has not been charged, the facts show that George Randle first participated, as an informer—if that is what he really was—on August 16, 1972. And, this occurred only *after* he had been indicted and arraigned (R. 296), not for suspicion but for the sale of heroin and for the possession of heroin for sale (R. 297, 436).

Additionally, and of no mean significance, there is the fact that Detective Frank Gaughan, the chief detective in this prosecution, testified that George Randle was in fact arrested for the sale of narcotics to a police officer (R. 300-301). This being so certainly clarifies the depths of both Randle's predicament at the time he sought out the police for work as an informant (R. 298), and the very real motives for his ultimate deception of the jury.

Further insight into the hold these officers obviously maintained over Randle, of course, is exposed by the fact that although the charges against him were dismissed on August 22, 1972, within one week of the date of his first efforts (R. 303) as an informant (R. 437), the officer admitted he was specifically told these charges could be revived (R. 308-309). Additionally, the credibility of George Randle's evidence must also carry the weight of the direct contradiction of his statement that he had never been convicted of a crime. The fact that he successfully deceived Detective Gaughan (R. 310, 315) and the prosecutor on this point certainly underscores our contentions.

Here, reference is being made to cogent facts which show, beyond dispute, that George Randle had pled guilty to having attempted "to obtain a Narcotic Drug . . . by fraud, deceit, misrepresentation or subterfuge," on December 5, 1968 (R. 438). And, on February 7, 1969, had been placed on two years probation (R. 440). Also, there is the fact that Randle had even been declared, on December 23, 1970, to be in violation of this probation. Since this occurred because of other and different acts of misconduct[2] must add further fuel to the required assessment of George Randle's credibility.

If nothing else, these facts show George Randle was on probation during the occurrence of all the crucial events in this case—including his testimony at the trial (R. 377-378). To be sure then, in fully gauging the significance of this affirmative showing, the following segment of the record takes on increasing importance:

> Q. Mr. Gaughan, in dealing with addicts as long as you have, sir, you know that they are quite deceitful, aren't they?
>
> A. If you give them a chance to be, they will be, yes.
>
> Q. Don't you agree that Mr. Randle had deceived you about his past record?
>
> A. Apparently he did until now, yes (R. 314-315).

Additional factors, exposing Randle's penchant for lying, was his direct testimony relative to his employment record. Here he testified to having worked for The Cleve-

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2. The outstanding charges pending against George Randle, when he was declared a violator, were those of burglary and larceny, operating a motor vehicle without the owner's consent, and non-support (R. 406).

land Crane Company for about four months and that he had quit in September, 1973 (R. 41-42). Prior to having worked for Cleveland Crane, he indicated having worked for the Parker Hannifin Company, for "about one year almost" (R. 43, 79). To this patent falsehood Randle added that he was currently drawing unemployment compensation from this latter company—that is, Parker Hannifin (R. 43), for which he claimed to be eligible because they had not fired him (R. 44).

The complete confutation of this latter testimony, to be sure, was supplied by Harold Bern, Jr., an Assistant Personnel Manager for The Parker Hannifin Company. The company records categorically showed that Randle only worked for this company from February 22, 1973 to June 1, 1973, when he was fired (with a recommendation that he not be rehired) "for cashing another employee's check without that employee's permission" (R. 349-350).

Even this is not all, Randle testified to many other absolutely false versions. Here, reference is being made to the testimony that his probation had been terminated in 1969 (R. 409). As to this, the record demonstrates it was violated in 1970 (R. 441). Then there was his testimony that although he had purchased drugs from a number of different people, the only name he could supply the jury was that of Ike Johnson (R. 62-63). This, despite the fact that while he was working for the detectives in this case, he would purchase drugs for his own use (R. 67). This he did whenever he "felt like it" (R. 68). He even admitted to using them whether the police were around or not (R. 69). As to this use, however, he said he was careful not to use any around them (R. 68-69).

In any event, it was made most apparent, even by his own admission, that he was a heroin addict (R. 82).

Equally clear were his motives for not revealing the sources of his personal supplies of narcotics (R. 61).

II

As to the specific charges in this case, Randle testified that on August 16, 1973 (while employed at Parker Hannifin [R. 113]) and working on the second shift—that is, 3:30 to 12:00 midnight (R. 114), he met with Detective Gaughan and another detective at the Bratenahl Police Station. There he was searched and wired for sound (R. 92). Leaving the police station they proceeded, in separate cars, to the area of the Pine Lounge and the restaurant (R. 100).

Randle stated that he entered these premises. Once inside, he had a brief conversation with a person whose name he did not know (*ibid.*). Next, he supposedly "asked to see Ike." According to him, at this point, Ike, the petitioner came out and remarked, "Who wants to see me?" (R. 100-101). According to Randle, he asked him for a half of tea (meaning a half of teaspoon of heroin) (R. 15), which Ike then supposedly gave him for the sum of money involved (R. 11). Significant here, by Randle's own admission, "there were very few words said" during this alleged transaction (R. 11). And he did concede, as he had to based on the specifics of his evidence on this point, that there should have been at least three different voices on the tape (R. 107).

Relative to the alleged transaction of August 18, 1972, which Randle testified occurred around 1:00 in the afternoon (R. 114), he again testified, as had been the case with the earlier date (*i.e.*, the 16th), that following its completion he then went to his regular job with Parker Hannifin (R. 114-115). But, of course, we know this could not have occurred, as Randle was not employed at Parker

Hannifin at anytime during the entire year of 1972 (R. 348 *et seq.*). This fact is beyond dispute in spite of Randle's positive testimony that he was working at Parker Hannifin at the time of these alleged occurrences (R. 114).

On the other hand, additional proof as to Randle's engineering of this entire plot can be gleaned from the obvious thrust of his testimony as to the alleged transaction of August 18, 1972. Here, Randle testified that he called the detectives to meet him at the Bratenahl Station (R. 115-116).

On this particular date, they brought along a policewoman (R. 116). Again, the routine was the same. He was supposedly searched before they embarked for the Pine Lounge and the restaurant (R. 119). Once inside, Randle testified he "observed a couple of people there" (R. 119). Pressed on this point, his original testimony was that he saw "Ike and a woman" on the premises (R. 120). Later this testimony was altered to include "a guy" being there (R. 121). This modification of Randle's testimony is crucial, since he not only admitted to having had a conversation with this guy (R. 122), he verified this man was the last person that he "talked to before . . . [he] left the premises" (R. 123).

In his description of the asserted transaction on September 5, 1972, Randle indicated this event occurred between 11:00 and midnight (R. 129). On this alleged occasion, he testified there were two different people on the premises of the restaurant (R. 131). These were Ike and a Howard Brown (R. 132). His evidence was that he asked Howard for a "tablespoon of heroin" (R. 133). Howard, he says, directed him to Ike to whom he gave the money in exchange for the stuff (R. 133).

Relative to this specific testimony, Randle was asked whether "on each of the occasions", when he went into this restaurant and made purchases (if, in fact, he did this) did anyone see the person to whom he was talking. And, wasn't it a fact that the only proof he had that he had even talked to Ike "on any of these occasions" is because he said so (R. 134). The fact that Randle stated this to be the case, in face of his expressed recognition of the fact that on the 18th, Zimilich and the policewoman were supposedly in a car parked directly across the street, has to be a most compelling admission (R. 123). The same is true of his admission that the tinfoil packets, containing the "heroin," could have been concealed by him in the car (R. 141).

Detective *Frank Shaffer* next testified for the State. This officer was in the surveillance team on August 16, 1972. He accounted for his presence by saying Detective Gaughan "needed assistance" at that time. Thus, he drove out to the Bratenahl Station with him. There they met Randle who was there when they arrived (R. 156). This officer then testified Randle was wired for sound (R. 167).

Even more importantly, Officer Shaffer testified that after seeing Randle park his car in the vicinity of the lounge (R. 172-174), they went completely around the block (R. 166). They neither saw Randle enter the premises nor emerge therefrom (R. 166-167, 176). Shaffer also indicated that there were other distinct occasions when Randle was completely out of their view (R. 170).

Next, Detective Shaffer, after admitting to having listened to the garbled tape of the alleged conversation "three times since it was originally recorded" (the last time being that very day), he still could not say how many different voices were on it (R. 175-176). The most

he could say, with any certainty, was that "it was more than two voices on the tape" (R. 160, 161). Since the radio or television was playing, this witness could not even tell whether or not Randle specifically engaged in conversation with more than one person (R. 163).

Surely the disclosure of this admission, and the fact that Randle did "try to identify the different voices for . . . [Shaffer] and Mr. Gaughan" (R. 163-164), emphasizes the total lack of corroboration for Randle's testimony that Ike was even on the premises on the 16th of August, to say nothing of having participating in this alleged transaction.

Then there was certain additional testimony, by Shaffer, which must affect his candor if a police officer's testimony can possibly be affected. Here Shaffer had originally testified that he saw Randle park his car in front of the Pine Lounge, following which they "observed him go inside" (R. 150-151). However, as indicated above, on cross-examination, Shaffer admitted that he did not see Randle enter the building nor did he see him emerge therefrom (R. 166-167, 176). In addition to this the record shows the following testimony:

> Q. Well, you didn't see him walk across St. Clair, did you?
>
> A. I don't recall that.
>
> Q. All right. If that is what happened, if what happened is that he parked his car on the opposite side of the street initially and you didn't see him walk across St. Clair, then he was out of your observation for an even longer period than you told us, right?
>
> A. I don't believe I said how long he was out.
>
> Q. Well, you left us the impression initially, didn't you, that both of you came east on St. Clair,

he parked here, as you got to the corner and made a turn you saw him walking toward the Pine Lounge, that is the impression you left us with, isn't it?

A. Yes

Q. Now you tell us his car could have been on the other side of the street. You told us that, too?

A. I'm not sure where he parked.

Q. Well, if it were on the other side of the street, then don't you admit there is a void in your testimony because you have not testified that you saw him walking across the street?

A. I just don't recall it, I'm sorry (R. 173-174).

It is also significant here to note that Detective Shaffer, in response to a question asked by the prosecutor, conceded that Mr. Randle was indeed an addict (R. 182-183).

The next witness for the State was Detective *Earl Zimlich.* This officer, with 28 years experience on the force, testified he had been assigned to the narcotic unit for the past 11 years (R. 184). Zimlich testified that he knew Randle as an addict and when they searched him he saw evidence of this fact (R. 208-209). It was Zimlich's evidence that on the 18th, he and Policewoman Bader were in a parked vehicle directly across the street from the restaurant. From this vantage point, he testified they were able to both listen over their monitor and to see inside the premises (R. 190-191). According to this detective, when Randle entered the premises there was a man seated at the bar (R. 212), and a girl behind the counter (R. 213). On the other hand, Zimlich could not say whether or not Randle said anything to this man, although he stated they might have exchanged "some hi or something" (R. 212). This position, Zimlich maintained,

although he had previously listened to the tape of the alleged conversations "within the last several days" (R. 212).

Quite possibly, the most crucial segment of this officer's testimony occurred during his direct examination. Distilled, this testimony contains the following assertions: Zimlich saw Randle enter the restaurant and walk past a male at one end of the counter. About six seconds later, Zimlich stated that he saw "Ike Johnson come out from the rear and talk to George Randle" (R. 191). Following this testimonial assertion, the officer was specifically asked:

> Q. Now, sir, while you were observing this did you have your monitoring device tuned in?
>
> A. Yes, sir.
>
> Q. Were you able to hear anything, sir?
>
> A. Yes, sir.
>
> Q. What, if anything, did you hear?
>
> A. I heard him ask Ike for a half a tea (R. 192).

The above quoted testimony by this expert witness (R. 219-220) must be compared with the following cross-examination of Detective Zimlich:

> Q. My question is, at any time you say you overheard a conversation while you say you saw Ike . . . on the premises, my question is quite simple, what did you hear Ike say?
>
> A. He asked him if he could get him a piece.
>
> Q. Ike asked Randle if he could get him a piece?
>
> A. Yes, sir.
>
> Q. A piece of what?
>
> A. A revolver.

Q. So that if I understand you correctly, the only thing you heard Ike say was to ask Randle if he could get him a piece?

A. I believe, yes, sir.

Q. Then later Mr. Randle left the bar?

A. Yes, sir.

Q. Now, as he was walking out of the bar, did he say anything to the man who was in the restaurant?

A. The customer?

Q. How do you know he was a customer?

A. Well, he was sitting at the counter.

Q. That makes him a customer?

A. Yes, sir.

Q. The man who was seated at the counter, did Randle say anything to him?

A. No, sir.

Q. You are positive that that is the case?

A. Well, he walked past him—

* * * * *

Q. Now, my question is this, did Randle say anything to the man before he left the premises?

A. I don't know (R. 218-219).

Actually, what makes for the importance of all this evidence is the fact that while Zimlich would claim credit for having *heard* this transaction consummated, his version of the attendant circumstances differs substantially from that of Randle. More specifically, Zimlich did not hear Randle ask for Ike, nor did he recall any conversation having taken place between Randle and the man he (Zimlich) called a customer (R. 213). Randle, on the

other hand, says he "asked for a fellow named Ike" (R. 24). And, of course, he had to ask someone. Randle says there was a conversation with Ike "about a half of tea" (R. 25). Zimlich was positive that the *only* thing Ike said was to ask Randle if he could get him a piece—a gun (R. 218). Randle, on the other hand, says the last person he talked to before leaving the premises was this other man (R. 123). But, of course, Zimlich testified Randle did not talk to the "customer" (R. 219).

Also, on cross examination, Detective Zimlich indicated by his testimony that Randle was employed "at Parker Hannifin or Cleveland Crane at that time" (R. 223-224). And, Zimlich emphasized that he likewise didn't trust addicts. Zimlich even conceded that he knew Randle was using drugs while working for them. To this end, he had a "definite recollection" of having talked to him about this (R. 227) on more than one occasion (R. 228).

As to the alleged transaction of September 5th, Zimlich testified he again listened to the monitoring equipment. On this occasion, he indicated that there were four different voices that could be heard. In any event, *the only voice he could determine was that of George Randle. This was likewise true of the conversations he heard on the 18th* (R. 213).

Following the testimony of Detectives Palahunic and Roubal, both of whom testified as to the chemical composition of the substances allegedly recovered from Mr. Randle and identified as heroin, the next crucial witness was Detective *Frank Gaughan.* This officer testified to being a part of the surveillance team on each of the dates set forth in the indictment—that is, the 16th and 18th of August, and the 5th of September. Gaughan too admitted knowing Randle as a "narcotic addict" (R. 296).

It was this officer who verified that their initial contact with Randle occurred when they arrested him on the basis of an indictment, which charged him with the sale and the possession for sale of heroin in April of 1972 (R. 296-297). Later, Detective Gaughan admitted that Randle got in contact with them because "he wanted to try to do something to help himself" (R. 297). To this end, Randle precipitated a meeting with them (R. 298). Although Gaughan denied that they had propositioned Randle (he didn't like the word "propositioned"), he did admit that they told him he would be better off if he cooperated with them (R. 298-299).

III

For his defense, Isaac Johnson offered, in addition to his own testimony, that of *Harold R. Bern, Jr.*, and *Harriet Markuszka.* As indicated above, Mr. Bern, appearing under subpoena, testified that Randle was not employed at his company, the Parker Hannifin Company, during the periods indicated in Randle's testimony and in the testimony of Officer Zimlich (R. 223-224). Both of these prosecution witnesses had testified Randle was employed at that company during August and September of 1972, the period within which the occurrences alleged in the indictment occurred.

Mrs. Markuszka, a Deputy Clerk of the Cuyahoga County Common Pleas Court, testified that the records in her department showed that Randle had indeed been indicted for the sale, on April 11, 1972, of heroin, and for the possession for sale of heroin on the same date. Additional testimony by her related to a Journal Entry (Defendant's Exhibit "C"), which demonstrated that the previously mentioned indictment was dismissed on September 1, 1972. This witness also identified (Defendant's Ex-

hibit "D") a Journal Entry showing that Randle had pled guilty on December 5, 1968, to having obtained a narcotic drug "by fraud, deceit, misrepresentation or subterfuge" in violation of the state Drug Laws, and that other charges were dismissed. In addition, to this, she identified another Journal Entry which showed that, on February 7, 1969 (Defendant's Exhibit "F"), Randle had been placed on probation. The final exhibit (—that is, Defendant's Exhibit "G") testified to by this witness showed that Randle, on December 23, 1970, had been declared a probation violator, and his case passed for sentence pending disposition of several then current charges.

Isaac Johnson, the Petitioner, testified he was 30 years old, married, and the father of two children. In admitting that he knew Randle by the name of "Bey," Johnson testified that he was a friend of a Benny Taylor, who worked at the restaurant. It was Johnson's testimony that Benny was a numbers writer and that Bey would play with him (R. 357-358). Johnson recalled that he had loaned him Five or Ten Dollars on several occasions when he would come to the restaurant (R. 358). He denied ever seeing any narcotics or knowing anything about Bey buying narcotics on the premises.

As to the 16th and 18th of August, and the 5th of September, the appellant had no definite recollection of those dates (R. 358). Commenting on Zimlich's testimony that he had had a conversation with Johnson sometime in July or August, Johnson had no recollection of ever having talked to him.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Preliminary Statement

It has been cogently observed, and in language that was clearly descriptive of the prime witness in this case, that "Habitual users of opium, or other like narcotics, become notorious liars. * * * 'The chronic morphinomaniac is often a confirmed liar. The truth is not in him.' * * * The capacity of a witness to observe and to receive accurate impressions, to retain them in his memory, and to correctly relate them, also his power and inclination to be truthful, are all subjects which go to the credibility of a witness." *People v. Crump*, 5 Ill. 2d 251, 125 N.E.2d 615, at 621 (1955).

These principles should underlie, if valid, the consideration given the contentions made in this petition. When this is done, hopefully this Court will conclude that the conviction of Isaac Johnson in this case is not based upon evidence that reaches that high degree of probative force required for criminal convictions.

I

Where the Prosecution's Case Rests Almost Exclusively on the Testimony of an Informer (Who Was Not Only Addicted to Narcotics Both at the Time of the Occurrences Asserted in His Evidence and at the Time He Testified But Who Sought Out the Police for the Sole Purpose of Having Them Compromise Certain Serious Charges Then Pending Against Him) Due Process Entitles the Accused to Have the Jury Given Special Instructions as to the Inherent Unreliability of a Witness of This Type.

In this case, a serious dispute existed as to whether there had in fact been any purchases or sales of narcotics. Hence, the question, simply put, was whether the dope addict-informer witness (George Randle) had indeed testified truthfully as to his asserted dealings with Isaac Johnson.

Since there was no meaningful corroboration for any of Randle's testimony as to these transactions (if in fact any occurred), the jury was required to decide if Randle could be believed beyond a reasonable doubt.

Most courts, of course, recognize the serious credibility questions inherent in the use of drug addicts as informers. Doubtless it was this reason, and to make sure that witnesses of this ilk are properly identified, that led the Supreme Court, in *On Lee v. United States*, 343 U.S. 747 (1952), to state:

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may weigh serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examina-

tion and to have the issues submitted to the jury with careful instructions.

Thus, where, as here, the informer's incriminating testimony is uncorroborated or unsubstantiated (in its critical aspects), special cautionary instructions are required. See *Orebo v. United States*, 293 F.2d 747 (1961); *Joseph v. United States*, 286 F.2d 468 (1960).

On the other hand, some federal courts, even when the informant's testimony *is* corroborated, favor instructions which are calculated not only to call the jury's attention to the inherent untrustworthiness of these addict-witnesses but to lead the jury to question the value of their evidence and its believability. In any event, the sufficiency of any such instruction depends upon the circumstances tending to corroborate the informer.

If the reasoning behind these cases is valid, our case then, to be sure, is just that much stronger. This is so, first of all, because George Randle had such clear motives for his activities both as an informer and as a witness. To this undeniable extent, Randle's appearance as a witness posed problems that were further magnified by the fact that he even had an interest in the outcome of the case.

Again, the facts showed Randle was an addict at the time of the events testified to by him (R. 57, 67, 296 & 317), and at the time of the trial (R. 54, 55, 57 & 82). Thus, it was because of these significant circumstances the special instructions were submitted to the court with a request that they be given to the jury.

More specifically, the trial court was told, at the time, that, "when you have an addict and informer who is testifying under the type of cloud . . . [as existed here] . . . the possibility of these charges being reinstated against

him, his admission that he is an addict even today, . . . [create a situation wherein] we are entitled to a special instruction to the effect that his testimony should be subjected to special scrutiny in line with . . . [the] instructions . . . prepared and given to the court" (R. 412). In concluding these remarks, counsel indicated to the court his utter disbelief that "the boiler plate instructions that are usually given are adequate" (*ibid.*).

Responding to this the Court not only rejected the submitted request, he did so emphatically by declaring outright that the jury would only be given "the standard instruction . . . for the credibility of witnesses" (R. 412-413). And this is exactly what the court did (R. 419-420).

As to the propriety of our special requests, despite the apparent lack of Ohio precedents in this area, a virtual plethora of federal cases support the giving of special instructions similar to those submitted. One of the leading cases is *United States v. Griffin*, 382 F.2d 823 (1967).

In *Griffin*, as here, only the word of the addict-informer connected the defendant with the crimes charged. There the Court held it was plain error not to instruct the jury *sua sponte* as to the reliability of an addict-informer when his testimony lacked substantial corroboration.

Another case is *United States v. Kinnard*, 465 F.2d 566 (1972). In this case, the Court found reversible error in the trial court's failure to give a requested cautionary instruction regarding the testimony of an addict-informer who had criminal charges pending against him and whose testimony was uncorroborated in a material respect. (The addict-informer's testimony lacked corroboration on the issue of whether the defendant was predisposed to purchase narcotics or was induced to make the purchase.)

Still another case, supporting our thesis, is that of *Virgin Islands v. Hendricks*, 476 F.2d 776 (1973). In the *Hendricks* case, the court aptly concluded cautionary instructions are required:

> When a witness is in the Government's pay and either is an addict at the time of trial or was an addict at the time of the events concerning which testimony has been given. Similar scrutiny must be used in weighing the testimony of a present or former addict who recognizes, or may recognize, the possibility of being rewarded by the Government. Examples of possible rewards are the dropping of charges presently pending against the witness and the recommending of a lighter sentence for a crime of which the witness has already been convicted. An instruction would be appropriate whether or not it is shown that the Government intends to reward the witness. It would be especially useful when the testimony of such a witness is uncorroborated as to a material fact. (476 F.2d, at 779-780.)

A comparable position has been taken by the Illinois Supreme Court in its decision in *People v. Bazemore*, 25 Ill. 2d 74, 182 N.E.2d 649 (1962). Here the court held that where the prosecutor's case rested on the credibility of an admitted dope addict, his testimony must be closely scrutinized.

Given these opinions and that of *On Lee* (*supra*), which emphasized the need for "careful instructions" when dealing with the credibility of an addict-informer, the position taken by Judge Young (that only the standard credibility instruction would be given) does seem difficult to explain. This is especially so in view of the rather strong position taken in some of these federal decisions, which

include cogent language by Judge (now Chief Justice) Burger, who remarked that a trial judge would be "well advised" to give cautionary instructions. *Hardy v. United States,* 343 F.2d 233 (1964). Also see *Fletcher v. United States,* 158 F.2d 321 (1946).

Significant here, in *Fletcher* (158 F.2d, at 322) it was recognized that "a drug addict is inherently a perjurer where his own interests are concerned." And, in *Griffin,* the Court has gone on record as having bluntly stated that "obviously the testimony [of an addict informer] was highly suspect" (382 F.2d, at 828). These observations are all the more persuasive when one realizes the effect addiction has, or may have, on such witness' capacity to observe, receive accurate impressions and retain these in his memory. Add to this the known effect addiction has on one's power and inclination to tell the truth, and the fact that George Randle was not kept under complete surveillance adds a further dimension to the court's unwillingness to give any cautionary instructions.

For these reasons, and because it is genuinely felt George Randle acted under a compulsion to produce a buy in order to curry needed favors from the police, we feel Isaac Johnson was grievously prejudiced by the court's outspoken refusal to give cautionary instructions. Given this posture, it seems only fair that Court of Appeals should have credited our Assignments of Error, Nos. 2 and 3. This being so, a new trial was surely required as there is simply no way these faults, in this conviction, can be deemed harmless beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250 (1969).

II

The Fact that "There Is No Established Law in Ohio on a Court's Duty to Specially Instruct as to an Addict-Informer's Testimony" Is Not a Legitimate Basis for the Summary Rejection of an Accused's Request That the Jury Be Specially Instructed as to Such Testimony.

Despite the suggestion in the Court of Appeals' *Journal Entry* (*infra*, p. A2), that the informant in this case had been an "undercover agent for two years" prior to his involvement in this situation; the fact is, according to the informant himself, his asserted participation in this case was his very first and (for aught that appeared) only effort. Not only this, his role in this case had resulted *solely* because of his own selfish desire to have the police compromise the charges then pending against him (R. 296-297, 436). These specific charges included the provable accusation that he had sold drugs directly to a police officer (R. 300-301).

Next, the Court of Appeals erroneously credits Randle (the addict-informer-witness) with having testified that, "since he joined a Methadone Program he was no longer using drugs." In all deference to that Court, they have quite obviously both misread the Record, and failed to understand that methadone is most definitely an opiate and as such is at least, if not more so, as addictive as heroin.

This is so in the first instance because Randle (the informant) testified without equivocation that he was using heroin not only prior to his arrest, but during the period when he was supposedly working on this case (R. 50-51, 63, 67-69, 71). This use he continued even while he was on and off the Drug Program (R. 54-58, 60). In fact,

he admitted using heroin as late as the month before he testified in this case (R. 81-82).

Then as to the Court's misclassification of methadone, their notion that it is not a narcotic drug to the contrary notwithstanding, methadone is a synthetic opiate in the same sense that heroin is a synthetic opiate. And, like heroin, it is more potent than morphine and is as addictive. The point behind the use of methadone is that it blocks the euphoric effect of heroin, so that if addicts like Randle inject heroin they should not feel any effect. Supposedly, it satisfies the addict's heroin hunger so that he feels no craving for heroin.

Under this concept, the addict is then regarded as being permanently on methadone. See Gearing, *Successes and Failures in Methadone Maintenance Treatment of Heroin Addiction in New York City*, 6 (1970).

On the other hand, Randle flatly admitted he was still a heroin addict (R. 82).

The Court then recites that "the defense fully brought out Randle's history of criminal involvement, drug abuse, and general [un]truthfulness as bearing on his credibility as a witness" (*Journal Entry, infra*, p. A7) as though that language contained a complete vindication of their position. The same is true of the Court's reference to the decision of *United States v. Thomas*, 484 F.2d 909 (1973).

As to the Court's citation of the *Thomas* case, one cannot avoid the impression that they have obviously concluded that because the defense exposed these infirmities in this witness' testimony and indeed did argue their theory to the jury, this somehow makes up for this gross deficiency in the trial court's charge to the jury. If this is the thrust of the expressed view, then, of course, the

Court's reliance on the dictum in *Thomas* must be regarded as sorely misplaced. This is so because the opposite view really makes more sense, as it is beyond dispute that,

> An argument to a jury, however, on a legal issue, unsupported by an instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct. *United States v. Phillips*, 217 F.2d 435, at 440 (1954).

In this same category is the Court's statement that "the defense had an unrestricted opportunity and in fact did thoroughly attack Randle's credibility." (*Journal Entry, infra,* p. A7). To this, the Court then concludes that "the jury weighed this and all other evidence before it on that basis, given the Court's general charge on credibility of witnesses." (*ibid.*).

Even assuming (as the Court has obviously done) that the jury weighed Randle's testimony on that basis—that is, on the basis of the defense's unrestricted opportunity to attack Randle's testimony—it is fallacious to then conclude that the jury properly weighed the fruits of this effort. Thus, it is a *non sequitur* to conclude they did so. This is so because *it does not follow* that because the defense did expose certain crucial facets of Randle's evidence the jury could fairly evaluate this evidence without the proper guidance the requested instructions, or comparable ones, would have given them.

Even this is not all, a close inspection of the Court's opinion reveals the unexpressed notion that while it is proper to instruct a jury they may take into consideration a witness' prior conviction in evaluating his credibility, and that such factors as interest in the outcome of the case or bias and prejudice may likewise be credited; it

becomes an impermissible comment if the jury is told they may take into consideration such factors as the drug addiction of the State's chief witness. Further, it is a comparable comment on the evidence to charge a jury that if they determined a witness was actuated by motives other than decency and honesty such was a factor they must reckon with.

While one is hard pressed to see how the requested charges can be regarded as comments on the evidence, the blunt fact remains, the Court did specifically instruct the jury they could take into consideration the defendant's interest in the outcome of the case.

Given this fact, an additional problem created by the Appellate Court's opinion is how can it be proper to single out the defendant's interest in the outcome of the case (and not regard this as a comment on the evidence—if that is what it is) and still rule a defendant is not entitled to an instruction that focuses on the inherent untrustworthiness of a drug addict, who was such both at the time of the alleged occurrence and at the time he testified.

As to the propriety of the unbalanced instructions, see *United States v. Reid*, 410 F.2d 1223 (1969).

If this Court agrees, as it must, that a defendant may show that a witness does indeed have a strong motive for giving false testimony, that he has previously been convicted of certain crimes, that serious charges against him were compromised, and that he actually committed perjury while testifying; then it should surely follow that the jury ought to be informed of the purpose for which such evidence was developed. Absent this, how then can it be said the right of impeachment did not suffer impermissible dilution.

While the appellate court expressed the view that, "there is no established law in Ohio on a Court's duty to specifically instruct as to an addict-informer's testimony" (*Journal Entry, infra,* A6), surely this flaw cannot serve as any justification for that Court's failure to correct so obvious a defect.

Hopefully, then, this Court will again agree (as was held in *United States v. Hoffa,* 385 U.S., at 311), that, "the established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross examination, and the credibility of his testimony to be determined by a properly instructed jury." If this is so, there does not appear to be any reason for saying inherently untrustworthy testimony should not be given special scrutiny.

This is especially so in a case where the defense made to the charges was that the accused was being framed. Thus, the most obvious effect of the Court's refusal to give, or incorporate the submitted charges, is that such amounted to a refusal to charge on the appellant's theory of defense. See *Strauss v. United States,* 376 F.2d 416 (1967) and *Tatum v. United States,* 195 F.2d 612 (1950).

Again, the petitioner's defense was that Randle's testimony incriminating him was a complete fabrication. Surely, this is a valid defense, even in Ohio. Of course, whether it was proven was the pivotal question the jury was to decide. Yet, the jury received Randle's testimony and apparently rejected this defense without having been given any meaningful guidance on the evaluation of this drug addict's testimony.

The upshot then of the appellate court's view is that obviously the jury chose to believe the addict in spite of the impeaching evidence and his obvious perjury. But does this really resolve the question as to our entitlement

to the requested instructions or comparable ones. Of course it does not, as the question still remains would the jury have still convicted the appellant if they had been properly instructed. While we can never know the answer to this question, we do know that the appellant was entitled to the chance that they might not have convicted him, and the Court's failure to give appropriate instructions deprived him of that chance, and consequently of due process as well.

Again, the total charge given the jury, in this very difficult case, on the credibility issues consisted of only two paragraphs of the most elementary prose imaginable. Certainly, more is required for a meaningful instruction than the reading of a pattern instruction on such an elusive concept as the credibility of a drug addict as opposed to that of a regular citizen.

While there are admittedly those who extol the virtues of pattern jury instructions (America Judicature Society, Report No. 6, *"Pattern Jury Instructions"*, 17 [1972]), any defense lawyer worth his salt will concede the uncritical acceptance of these instructions is a disservice to his client. As there can hardly ever be a case in which individuated instructions would not be fairer to the accused. This is so because, "no matter how sound philosophically a proposition may be, it is unfit for adoption in any Anglo-American law unless a jury can be made to understand it." Loomus, *The Trial Judge* (Foundation Press, 1937).

Of course, we agree that a trial court is not required to give the theory of the case instruction in the precise language tendered by the defendant. Further, as long as the theory is adequately presented in the instruction given no harm occurs. Where, however, as here, the trial court declines to charge on a particular defense theory, he di-

lutes the defendant's overall defense by removing the particular defense from the jury's consideration. In effect, the judge directs a verdict on that issue against the defendant. See *Strauss v. United States*, 376 F.2d 416 (1967).

In this case, the State has contended (and in this the Court of Appeals is apparently in accord) that even where a witness has been granted such things as immunity and other considerations, even upon request, a cautionary instruction which identifies any such circumstances as a factor may affect such witness' credibility.

In our view, as argued above, an accused is entitled as a matter of due process to an instruction that in assessing the credibility of a witness granted immunity, the jury may consider conduct by the State which might lead the witness to believe his prospects for lenient treatment depend upon the degree of his cooperation.

The Petitioner was also entitled to an instruction that the testimony of an informer who provides evidence against a defendant for pay, for immunity from punishment, or for personal advantage or vindication, must be examined by the jury with greater care than the testimony of an ordinary witness, and that the jury must determine whether the informer's testimony has been affected by interest or prejudice against the defendant. 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, §12.03 (2d ed. 1970); LaBuy, *Jury Instructions in Federal Criminal Cases*, §6.08 (1965); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Hill*, 470 F.2d 361, 365 n. 10 (D.C. Cir. 1972).

Additionally, the jury should have been cautioned to give careful scrutiny to the testimony of this drug addict. As to this, the authority is persuasive that an instruction

that a person who regularly uses narcotics may have a motive for testifying falsely and for falsely accusing persons of supplying him with drugs, and further, that regular use of narcotic drugs may impair the witness' capacity to observe, remember and recall. *United States v. Kearney,* 420 F.2d 170, 173-174 (D.C. Cir. 1969).

The addict informer is a particularly suspect witness whose testimony calls for a special cautionary instruction. *Virgin Islands v. Hendricks,* 476 F.2d 776, 779-780 (3d Cir. 1973); See also *United States v. Collins,* 472 F.2d 1017, 1018-1019 (5th Cir. 1972), *cert. denied sub nom. Branch v. United States,* 411 U.S. 983 (1973). In *Fletcher v. United States,* 158 F.2d 321, 322 (D.C. Cir. 1946), the court said that ". . . a drug addict is inherently a perjurer where his own interests are concerned. . . ." While the court in *Hendricks* upheld the trial court's refusal to use the "inherently a perjurer" language, it did approve an instruction that an addict-informer's testimony should be "scrutinized with great care and received with caution," and indicated that a stronger instruction could be given:

> We did not, however, mean to suggest that, if it is requested, a special cautionary instruction is not proper when a witness is in the Government's pay and either is an addict at the time of trial or was an addict at the time of the events concerning which testimony has been given. Similar scrutiny must be used in weighing the testimony of a present or former addict who recognizes, or may recognize, the possibility of being rewarded by the Government. Examples of possible rewards are the dropping of charges presently pending against the witness and the recommending of a lighter sentence for a crime of which the witness has already been convicted. An instruction

would be appropriate whether or not it is shown that the Government intends to reward the witness. It would be especially useful when the testimony of such a witness is uncorroborated as to a material fact.

While the precise formulation of the instruction is up to the trial court, it should set out the rationale for examining the testimony of such a witness with special caution. . . . [A]n addict-informer faces the immediate threat of being jailed and thereby kept from access to the drugs to which he is addicted, as well as the prospect of a long term prison sentence and possible retaliation from various persons in the drug trade. These factors substantially increase the danger that the addict-informer may color his testimony so as to place guilt on the defendant. 476 F 2d 776, at 779-780. [Footnotes and citations omitted.]

See also *United States v. Kinnard,* 465 F.2d 566, 570-573 (D.C. Cir. 1972) (Bazelon, C. J., concurring). In a case where the defendant's guilt rested almost totally on the testimony of an addict-informer who was corroborated only in minor details, the failure to give a cautionary instruction *sua sponte* was held to be plain error requiring reversal. *United States v. Griffin,* 382 F.2d 823, 829 (6th Cir. 1967).

III

An Accused in a Criminal Case Is Entitled as a Matter of Due Process to Have the Jury Consider, Under Proper Instructions, Any Theory of Defense Which Is Supported by the Law and Which Has Some Foundation in the Evidence.

Although the fact is not apparent from the opinion rendered by the Ohio Court of Appeals, the defense presented by petitioner to the charges in this case was that

he was framed by the State's chief witness—George Randle. The primary thrust of the defense cross examination of Randle and of the various police officers was to show that Randle actively sought to gain "a bargaining lever" insofar as his own charges were concerned. In this sense, his ulterior motive was to have the State accept Johnson as a substitute for him.

To this end, it was shown that very serious charges against this witness were conditionally compromised. It was shown that he was a hard-core drug addict at all times relevant to this case (including when he testified), and that he was actively using drugs (hence, was under their influence) while he was supposedly working with the police.

Surely, as was said in *United States v. Vole,* 435 F.2d 774, at 777 (7th Cir. 1970),

> The above facts, while not establishing that . . . [he] was, in fact framed by . . . [the witness], satisfy the minimal requirements needed for admitting an instruction encompassing a theory of defense.

Again, in reliance on the *Vole* case, we contend here that the routine instruction on the credibility of witnesses did not sufficiently encompass this theory of defense. Also see *United States v. Grimes,* 413 F.2d 1376 (7th Cir. 1969). Also see *Turner v. State,* 64 Wis. 2d 45, 218 N.W.2d 502 (1974), and *United States v. Leach,* 427 F.2d 1107 (1970).

Still another case, one which points directly to the issue here, is that of *United States v. Gilbreath,* 452 F.2d 992 (5th Cir. 1971). In this case, the Court aptly concluded:

> The primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them. . . . Accordingly, a defendant is entitled to a charge which precisely and specifically, rather than merely or generally or abstractly, points to the theory of his defense (452 F.2d, at 994).

So postured, a very real question must be said to exist here as to whether the defense made to these charges was sufficiently encompassed in the routine credibility instructions submitted to this jury. In our judgment, due process entitled petitioner to more than he was accorded on this point.

IV

Due Process Is Violated Where the Evidence Designed to Prove Guilt Consists Solely of the Uncorroborated Testimony of an Addict-Informer, Whose Evidence Was Created and Given in Exchange for Dismissal of Very Serious Charges Against Him.

With the advent of Rule 29, *Ohio Rules of Criminal Procedure,* the notion that only a *prima facie* case is required for a prosecutor's case in chief to survive the motions, made at the close either of the State's case or at the close of all the evidence, should have been put to rest. For surely this Court must agree this Rule requires the trial court to determine whether a reasonable jury might find the defendant guilty beyond a reasonable doubt.

In this sense it seems that the outer limit for an acceptable determination of guilt is that point at which the evidence is so weak that a reasonable juror must

have a reasonable doubt about the defendant's guilt. See *Curley v. United States,* 160 F.2d 229, at 232 (1947). Thus, we contend here that when measured by this test for sufficiency, the evidence fails to pass the requirements of due process, within the concept studied in *In Re Winship,* 397 U.S. 358 (1970).

We concede that the credibility of any witness is usually a matter for the jury, rather than for the trial court or for an appellate court. And, if George Randle were an ordinary witness, though a felon and impeached to the extent that he was, this Court would probably not seriously consider this aspect of our contentions. But Randle was not a *mere* felon. He was a confirmed drug addict, who faced serious charges for the sale of narcotics. In addition, he had actually sought out the police to make a deal for the elimination of these serious charges.

In this sense, Randle had a built-in state of untrustworthiness. Add to this the fact that there were obvious flaws, inconsistencies and outright lies in his evidence, and these facts surely must persuade this Court to agree that "there comes a point when the witness' qualifications are so shoddy that a verdict of acquittal should be directed." *United States v. Miceli,* 446 F.2d 256, at 259 (1971). Also there is the undeniable fact that Randle was virtually programmed, to make a formidable showing to justify the officers' efforts on his behalf.

As to this specific contention, it is beyond dispute that the police are surely capable of influencing the actions of informers. Any notions to the contrary are easily dispelled by even a cursory reading of *United States v. Colson,* 230 F. Supp. 933 (1954). This case offers a revealing, and in some instances sordid, picture of the type of tactics enforcement officers are capable of resorting to in an effort to control informers in narcotic prosecutions.

More probable than not, it was for this reason that the argument has been made that the need for cautionary instructions is not eliminated when the informer's testimony is only corroborated by that of a police officer. See *Hardy v. United States,* 343 F.2d 233 (1964). Also see *Bush v. United States,* 375 F.2d 602 (1967).

In any event, there is no denying the case against Isaac Johnson was dependent upon the testimony of the drug addict, George Randle, being given absolute credibility. In this sense, his evidence was highly suspect. This is so because George Randle was a desperate informer whose avowed purpose was to avoid suffering any penalties as a consequence of his own criminal activities as a dope peddler.

Such being the case, can there be any doubt he would not hesitate to frame anyone if such would benefit him. Being an addict, to the officers' knowledge, he necessarily had to violate the law almost constantly during the period he was assisting them. This he admits. And being a professional informer interested both in the continued satiation of his own habit; as well as, the elimination of his own pending case, his character was the lowest and most untrustworthy possible.

With these factors in mind it does not tax credulity to believe that George Randle actively fabricated the chain of events that ultimately led to the arrest, indictment and conviction of Isaac Johnson. This being the case, the reverse is also true—it does tax credulity to see how a jury could be convinced beyond a reasonable doubt on the basis of this witness' evidence. The point being made here is that the proof in this case was so unsatisfactory as to justify a finding of reasonable doubt as a matter of law here. If this is so, then it can only follow that if "there comes

a point when the witness' qualifications are so shoddy that a verdict of acquittal should be directed", that point was surely reached in this case.

CONCLUSION

In this appeal certain factors are undeniably relevant. These include the fact that the credibility of the State's chief witness as against that of the petitioner provided the most challenging issue faced by the jury.

As to this facet of the case, this Court has recognized that the use of informers does raise serious questions of credibility and, consequently, has held that a defendant is entitled to have the issue submitted to the jury with "careful instructions." *On Lee v. United States,* 343 U.S., at 757.

Granted, the degree of caution required in such instructions varies with the circumstances of the case. In *Fletcher v. United States*, 158 F.2d 321 (1951), where the government's case depended almost solely on the testimony of the informer, the court held the jury should be instructed "to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon the defendant in furtherance of the witness' own interest." Further, that since the informer in that case was also a drug addict, the court's added instruction should have required corroboration of his testimony, or stated that "it should be received with suspicion and acted upon with caution." (*Id.*, at 322). Also see *United States v. Hill*, 470 F.2d 361 (1972), to the effect that it is proper to single out the special interests of an informer and bring it to the attention of the jury.

So postured, the real question posed here, simply put, is whether the routine credibility instructions, such as were given to the jury in this case, were sufficient to meet the requirements of due process.

In our view, to rule that the instructions given in this case were adequate is to reject, as being invalid, the well reasoned decision of our most prestigious Federal Courts, including this Court.

For this and all of the other reasons argued above, the petition for writ of certiorari should be granted. Further, upon review by this Court, this conviction should be reversed.

Respectfully submitted,

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APPENDIX A

Opinion and Journal Entry of the Court of Appeals

(Dated May 30, 1974)

No. 33254

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee,

vs.

ISAAC JOHNSON,
Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the exhibits and transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant was indicted November 10, 1972, for eight violations of the narcotic drug laws:

Case No. 6441:

1) unlawful possession of heroin for sale, R. C. 3719.20(A);

2) unlawful sale of heroin, R. C. 3719.20(B);

3) conspiracy to violate drug laws, R. C. 3719.20 (H);

and in

Case No. 6442:

1) possession of heroin for sale;

2) possession of heroin for sale;

3) sale of heroin;

4) sale of heroin;

5) unlawfully permitting a building to be used to keep and dispense heroin, R. C. 3719.101.

The cases were consolidated for trial on the state's motion. Also on the state's motion, count 3 of No. 6441, and counts 4 and 5 of No. 6442 were nolled. Appellant was tried before a jury on the five remaining counts which jury, on November 14, 1973, returned guilty verdicts to all counts. Appellant was sentenced to the Ohio penitentiary and now appeals his judgment of conviction below.

George W. Randle, 25 years old, and by his own admission a former heroin addict (R. 36-37), acted for the Cleveland police in purchasing heroin from the appellant on three occasions and was the chief prosecution witness at trial. Randle testified that he had worked with the police as an "undercover agent" for about the last two years ever since he was arrested on drug charges. (R. 7, 35). Randle admitted his history of drug abuse on direct and cross-examination (R. 36, 51), and stated that he has since joined a methadone program and was at that time no longer using drugs. (R. 37, 51-55).

Randle's arrest, indictment, conviction, probation record and police involvement were all brought out before the jury, through his own and police testimony. (R. 35, 46, 295-298, 300-309, 404-408, 383, Defendant's Exhibits B to G).

Randle testified that on three separate occasions he made controlled heroin purchases from the appellant under police supervision. Randle testified that on August 16, August 18, and September 5, 1972, he met with Cleveland police detectives, was searched and wired with a sound monitoring device, and each time went to the Pine Tree Lounge near E. 137th Street and St. Clair Avenue in Cleveland to purchase heroin from the appellant with money supplied him by the police. (R. 14). Randle testified that inside the Pine Tree Lounge on August 16th he asked appellant for "half a tea," i.e., one-half teaspoon of heroin. (R. 11-13). Randle identified the defendant, Isaac Johnson, as the man who sold him the heroin contained in an envelope bearing Randle's initials and identified at trial as State's Exhibit 1. (R. 13-16). On August 18th (R. 20) he went through the same preliminary procedure and again asked for "Ike" at the Pine Tree Lounge (R. 24) and purchased "half a tea" of heroin from the appellant (R. 25); this substance was contained in an initialed envelope and identified at trial as State's Exhibit 3. (R. 27). On September 5th (R. 30) Randle again under the same procedure went to the Pine Tree Lounge and asked "Ike" for "half a tea" of heroin, which he purchased from appellant. (R. 31-33). Randle identified the substance from this purchase as State's Exhibit 4 and also identified the tape the police made of the conversations which he initialed on the cassette cover, as State's Exhibit 5. (R. 33-34).

Randall testified that he wasn't paid for his services (R. 47) nor were any promises made to him when he

was originally picked up by the police who suggested this kind of work to him. (R. 37-38).

Cleveland Police detectives corroborated Randle's testimony that before and after each of the three controlled purchases Randle was stripped, thoroughly searched and provided with money to make the purchase. On each occasion police accompanied Randall to the immediate vicinity of the Pine Tree Lounge. Det. Shaffer testified that he observed Randle enter and leave the Pine Tree Lounge during the purchase on August 16th. (R. 150-153). Det. Zimlich testified that on August 18th, he observed Randle go inside the Pine Tree and then from his vantage on the street saw Randle and the appellant inside talking with each other. (R. 189-191, 248). Over the monitoring device, Det. Zimlich heard Randle ask appellant for the "half a tea" of heroin. (R. 192). Det. Zimlich also testified that during the purchase on September 5th, he was able to hear Randle's voice over the monitoring device and observed appellant inside the lounge just after Randle had walked back out onto St. Clair Ave. (R. 200-206).

At trial, defense counsel's motions for judgment of acquittal, i.e., directed verdicts, were denied. Further, defense counsel's special requests to instruct on Randle's credibility were denied and the court gave a general instruction on the question of credibility of witnesses.

Appellant assigns four errors for our consideration:

(1) The Court erred in denying the appellant's "Motion for Judgment of Acquittal" made at the end of the State's case and renewed at the close of all the evidence.

(2) The Court erred in failing to give, or otherwise incorporate in its general charge, any of the specifically requested instructions.

(3) The failure of the Court to give the jury cautionary instructions with reference to the testimony of the admitted dope addict (who testified to facts showing his activities as an informer were directly related to his desire for a compromise of serious charges that were then pending against him, and whose appearance as a witness was conditioned by his knowledge that these charges could be reinstated) was prejudicial.

(4) There is insufficient evidence as a matter of law to sustain the appellant's conviction on any count.

Appellant's assignments of error Nos. 1 and 4 shall be considered together on the following basis:

> Where the evidence in a criminal case tends to sustain the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant. *State v. Whitley* (1969), 17 Ohio App.2d 159, 162; *see also State v. McGrew* (1971), 25 Ohio App.2d 175, 178.

In the instant case there was direct evidence to sustain each count, i.e., Randle's testimony and the heroin exhibits, as well as substantial circumstantial evidence, i.e., the detectives' testimony. Therefore, it would be error to direct a verdict for the appellant as he suggests and withdraw the case from the jury. Moreover, the jury with all the evidence properly before it chose to accept Randle's statements over the appellant's denials on the stand. We conclude the jury had sufficient evidence before it and within its proper function weighed that evidence and the credibility of the witnesses and returned verdicts of guilty on all counts. Under these circumstances we will not reverse. *See State v. DeHass* (1967), 10 Ohio St. 2d 230.

Assignments of error Nos. 1 and 4 are without merit and are overruled.

Appellant's assignments of error Nos. 2 and 3 shall be consolidated as both maintain that the court erred in refusing defense counsel's special requests to charge the jury on Randle's credibility as a witness for the State.

Appellant cites several federal decisions that reversed convictions for violations of federal drug laws because special cautionary instructions on addict-informers' credibility were not given. *See, e.g., United States v. Griffin* (6th Cir., 1967), 382 F.2d 823. These federal decisions, however, are not controlling on our state courts.

First, federal district court judges have considerable latitude and discretion to comment on the evidence, including testimony, whereas our state judges do not. Appellant's special request constituted such a comment on Randle's testimony. It has been held that comment from the bench tending to bolster an informer's admittedly suspect credibility is prejudicial and reversible error. *See State v. Thomas* (1973), 36 Ohio St.2d 68. Therefore, under the circumstances of this case, we conclude that any comment from the bench challenging the informer's credibility any further than had already been done on cross-examination was unwarranted. *Cf. State v. Tabasko* (1970), 22 Ohio St.2d 36, 43-44. A court is only required to include in its instructions to the jury those written requests that embody correct statements of the law of this state. There is no established law in Ohio on a court's duty to specially instruct as to an addict-informer's testimony as exists among the federal circuits. Therefore, the court did not err in refusing to give the defense's special requests to instruct the jury as such instructions did not represent a correct statement of Ohio law.

The defense fully brought out Randle's history of criminal involvement, drug abuse, and general truthfulness as bearing on his credibility as a witness. Furthermore, the General Assembly has specifically provided that "[n]o person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime. * * * Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness." R.C. 2945.42.

It is well established in this state that the weight of the evidence including the credibility of witnesses are questions for the jury. *See State v. DeHass, supra; State v. Swiger* (1966), 5 Ohio St. 2d 151; *State v. Lynn* (1966), 5 Ohio St.2d 106. The defense had an unrestricted opportunity and in fact did thoroughly attack Randle's credibility. The jury weighed this and all other evidence before it on that basis, given the court's general charge on credibility of witnesses.

In a recent Sixth Circuit decision, *United States v. Thomas* (6th Cir., 1973), 484 F.2d 909, the defense had requested a special charge relative to the credibility of the gun dealer in a prosecution under federal statute for making false or fictitious statements to a licensed firearm dealer in connection with the purchase of a handgun by a defendant who had been dishonorably discharged from the Army. In affirming the conviction the court held that:

> Adequate instructions on credibility were given to the jury, and we do not consider that it was reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury. *Blauner v. United States*, 293 F.2d 723, 738 (8th Cir.), cert. denied, 368 U.S. 931, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961), 484 F.2d at 912.

For the reasons stated above, we hold that the weight the jury gives the testimony of an addict-informer is a defense theory and not a matter of Ohio law upon which the court can be charged with a duty to instruct. Any special instruction on the addict-informer's testimony would, according to a recent decision of our supreme court constitute improper comment on the evidence. *See State v. Flonnery* (1972), 31 Ohio St.2d 124, 131:

> The trial court, exercising its discretionary power, gave an extensive charge upon the subject of the testimony of claimed accomplices and cautioned the jury that such was to be 'acted upon with the utmost caution.' Such instruction is improper as constituting a comment upon the evidence.

Thus, it is not plain error as appellant suggests for the court to fail to give special instructions on this defense theory.

Appellant's assignments of error Nos. 2 and 3 are without merit and are overruled.

The judgment is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JOSEPH H. SILBERT
Presiding Judge

SILBERT, C.J., CORRIGAN, J., MANOS, J., concur.

APPENDIX B

Journal Entry of Court of Appeals Denying Rehearing

(Dated June 19, 1974)

No. 33254

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee,

vs.

ISAAC JOHNSON,
Appellant.

JOURNAL ENTRY

Motion by defendant-appellant for reconsideration overruled. Exc.

/s/ JOSEPH H. SILBERT
Presiding Judge

SILBERT, *C.J.*, CORRIGAN, *J.*, MANOS, *J.*, concur.

APPENDIX C

Entry of Supreme Court of Ohio Denying Leave to Appeal

(Entered September 20, 1974)

No. 74-565

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

ISAAC JOHNSON,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

It is ordered by the Court that this motion is overruled.

APPENDIX D

Entry of Supreme Court of Ohio Dismissing Appeal

(Entered September 20, 1974)

No. 74-565

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

ISAAC JOHNSON,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX E

Journal Entry of Common Pleas Court

(November 20, 1973)

No. CR-6441 and CR-6442

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,
Plaintiff,

vs.

ISAAC JOHNSON,
Defendant.

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant, Isaac Johnson was brought into Court, represented by counsel.

Now comes the Jury, conducted into Court by the Bailiff and returned the following verdicts as to the five rmeaining counts, to-wit: "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Isaac Johnson, guilty of Drug Violation, RC. 3719.20(A), as charged in the first count." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Isaac Johnson, guilty of Drug Violation, RC. 3719.20(B) as charged in the second count." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Isaac Johnson, guilty of Drug Violation, RC.

3719.20(A), as charged in the third count." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Isaac Johnson, guilty of Drug Violation, RC. 3719.20(A) as charged in the fourth count." and "We, the Jury in this case being duly impaneled and sworn, do find the defendant, Isaac Johnson, guilty of Drug Violation, RC. 3719.20(B), as charged in the fifth count."

Thereupon, the Court informed the defendant of the verdict of the Jury, and inquired of him if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is, therefore, ordered and adjudged by the Court that defendant, Isaac Johnson, be imprisoned and confined in the Ohio Penitentiary, Louisville, Ohio, under each count, for an indeterminate period, according to law.

Sentence in Case No. CR-6441, count one RC. 3719.20 (A), for a period of ten (10) to twenty (20) years, sentence as to count two RC. 3719.20(B), for a period of twenty (20) to forty (40) years, sentence as to each count to run concurrently.

Sentence in Case No. CR-6442, count one, RC. 3719.20 (A), and count three, RC. 3719.20(A), for a period of ten (10) to twenty (20) years, sentence as to count two, RC. 3719.20(B), for a period of twenty (20) to forty (40) years. Sentence as to each count to run concurrently.

Sentence in Case CR-6442, to run consecutive to sentence in Case No. CR-6441.

Defendant's bond increased to $20,000.00.

Defendant released in custody of Attorney Jim Willis for twenty-four hours in which time additional bond to be made, or he is to be returned to County Jail.

/s/ Lucien C. Young
Judge

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

October Term, 1974
No. 74-529

ISAAC JOHNSON,
Petitioner,

VS.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1974
No. 74-529

ISAAC JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed

the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Adequate instructions on credibility of witnesses were given to the jury by the trial court, and it was not reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury.

2. The trial court properly refused to charge the jury in a narcotics case with a cautionary instruction to the effect that the testimony of an undercover police informant is inherently unreliable.

3. Due process of law was not violated by use of an informant's testimony, especially in view of the fact, that such testimony was given voluntarily, without promises.

4. Where the evidence in a criminal case sustains the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant.

STATEMENT OF THE CASE

Petitioner, Isaac Johnson, was indicted by the Cuyahoga County Grand Jury on November 10, 1972 for eight violations of the State of Ohio's narcotic drug laws. In Case No. CR 6441 petitioner was charged with:

(1) Unlawful possession of heroin for sale, Ohio Revised Code, Section 3719.20 (A)

(2) Unlawful sale of heroin, Ohio Revised Code, Section 3719.20 (B)

(3) Conspiracy to violate drug laws, Ohio Revised Code, Section 3719.20 (H).

In Case No. CR 6442 the petitioner was indicted for:

(1) Possession of heroin for sale

(2) Possession of heroin for sale

(3) Sale of heroin

(4) Sale of heroin

(5) Unlawfully permitting a building to be used to keep and dispense heroin, Ohio Revised Code, Section 3719.101.

Petitioner's two cases were consolidated for trial upon the State's motion. Also, on the State's motion count 3 of Case No. CR 6441, and counts 4 and 5 of Case No. CR 6442 were nolled. Petitioner was tried before a jury on the five remaining counts. On November 14, 1973, the jury returned guilty verdicts with respect to all counts involved. Petitioner was sentenced to the Ohio State Penitentiary for the term provided by law. Following his conviction, petitioner appealed to the Court of Appeals for the Eighth Judicial District. Unanimously the Court of Appeals affirmed the conviction of the petitioner.

Petitioner then sought review in the Ohio Supreme Court. That Court dismissed petitioner's appeal for the reason that no substantial constitutional question existed.

Petitioner now seeks review of his judgment of conviction. This court should deny the petition for a writ of certiorari.

STATEMENT OF THE FACTS

George W. Randle, twenty-five years old, and by his own admission a former heroin addict, acted for the Cleveland Police Department in purchasing heroin from the petitioner on three occasions and was the chief prosecution witness at the trial of the petitioner. Randle testified that he had worked with the police as an "undercover agent" for the past two years. Randle admitted his history of drug abuse on direct and cross-examination, and stated that he has since joined a methadone program and was at that time no longer using drugs (R. 37, 51-55).

Randle's arrest, indictment, conviction, probation record and police involvement were all brought out before the jury, through his own and police testimony.

Randle testified that on three separate occasions he made controlled heroin purchases from the petitioner under strict police supervision. Randle testified that on August 16th, August 18th, and September 5, 1972, he met with Cleveland Police Detectives, was searched by them and wired with a sound monitoring device and each time went to the Pine Tree Lounge near East 137th Street and St. Clair Avenue in the City of Cleveland to purchase heroin from the petitioner with money supplied him by the police. Randle testified at trial that inside the Pine Tree Lounge on August 16th he asked petitioner for "half a tea," i.e.,

one half teaspoon of heroin (R. 11-13). Randle identified the petitioner, Isaac Johnson, as the man who sold him the heroin contained in an envelope bearing Randle's initials and identified at trial as State's Exhibit 1 (R. 13-16). On August 18th Randle went through the same preliminary procedure and again asked for "Ike" at the Pine Tree Lounge and purchased "half a tea" of heroin from the petitioner; this substance was contained in an initialed envelope identified at trial as State's Exhibit 3 (R. 27). On September 5th, Randle again repeating the same procedures with the police department went to the Pine Tree Lounge and once more asked for "Ike" for "half a tea" of heroin which he purchased from the petitioner. Randle identified the substance from this purchase as State's Exhibit 4 and also identified the tape recordings that the police made of the conversations which he initialed on the cassette cover, as State's Exhibit 5.

Randle testified that he wasn't paid for his services nor were any promises made to him when the police requested that he help them in an undercover capacity.

Cleveland Police Detectives corroborated Randle's testimony that before and after each of the three controlled purchases of heroin Randle was stripped, thoroughly searched, and provided with money to make the purchases. On each occasion a Member of the Cleveland Police Department accompanied Randle to the immediate vicinity of the Pine Tree Lounge. For example, Detective Shaffer testified that he observed Randle enter and leave the Pine Tree Lounge during the purchase on August 16th. Detective Zimlich testified that on August 18th, he observed Randle go inside the Pine Tree Lounge and then from his vantage on the street saw Randle and the petitioner inside talking with each other. Over the monitoring device Detective Zimlich heard Randle ask the peti-

tioner for the "half a tea" of heroin. Detective Zimlich also testified that during the purchase on September 5th he was able to hear Randle's voice over the monitoring device and observe the petitioner in the Lounge just after Randle had walked back out onto St. Clair Avenue. The entire procedure as set out above was also corroborated by Detective Frank Gaughan who was present at all of the controlled purchases and who also saw the petitioner in the Pine Tree Lounge.

The record overwhelmingly reveals that the petitioner was guilty of the charges which were placed against him.

REASONS FOR DENYING THE WRIT

1. Adequate instructions on credibility of witnesses were given to the jury by the trial court, and it was not reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury.

2. The trial court properly refused to charge the jury in a narcotics case with a cautionary instruction to the effect that the testimony of an undercover police informant is inherently unreliable.

Petitioner contends that the trial court should have charged the jury with a cautionary instruction to the effect that the testimony of the State's witnesses was inherently unreliable. That contention cannot stand for several compelling reasons.

The trial court gave adequate instructions on the credibility of witnesses. The trial court instructed the jury that they could believe all of the informant's testimony, that they could reject and disbelieve all of the informant's

testimony, or that they could accept some parts of the informant's testimony and reject other parts of this testimony.

Moreover, petitioner's counsel argued quite vigorously to the jury the informant's past history of criminal involvement, drug abuse and general truthfulness as bearing on his credibility as a witness. Furthermore, it is a well-established principle of law in the State of Ohio as well as in other state courts that the weight of the evidence, including the question of credibility of witnesses, are questions for the jury. See, *State v. DeHass*, 10 Ohio St. 2d 230 (1967).

Petitioner's counsel had an unrestricted opportunity and, in fact, thoroughly attacked the informant's credibility. The jury weighed this and all other evidence before it on that basis, with the aid of the court's general charge on credibility of witnesses.

Clearly no error was committed by the trial court's refusal to give a special cautionary instruction giving special emphasis to a defense theory already argued to the jury. In a recent Sixth Circuit decision, *U. S. v. Thomas*, 484 F.2d 909 (6th Cir. 1973), the defense had requested a special charge. In affirming the conviction the court held:

> "Adequate instructions on credibility were given to the jury, and we do not consider that it was reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury. *Blauner v. United States*, 293 F.2d 723, 738 (8th Cir.), *cert. denied*, 368 U.S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961)."

Finally, in order to bolster petitioner's contention, his counsel has cited several Federal decisions. Some of those

cases deal with matters far different than those presented here and are easily distinguishable. These Federal decisions are not controlling on State courts. First, Federal District Court Judges have considerable latitude and discretion to comment on the evidence, including the testimony, whereas state judges in Ohio do not. Petitioner's special request for an instruction would constitute a comment on the informant's testimony. It has been held, under Ohio Law, that comment from the bench tending to bolster an informer's admittedly suspect credibility is prejudicial and reversible error. See, *State v. Thomas*, 36 Ohio St. 2d 68 (1973). Any comment from the bench tending to bolster the informant's credibility any further than had already been done on cross-examination would be unwarranted. See, *State v. Tabasko*, 22 Ohio St. 2d 36, 43, 44 (1970).

Under Ohio Law a court is only required to include in its instructions to the jury those written requests that embody correct statements of the law of this State. There is no established law in Ohio on a court's duty to specially instruct as to an addict-informer's testimony, as exists among the federal circuits. Therefore, the court did not err in refusing to give defense's special request to instruct the jury as such instructions did not represent a correct statement of Ohio Law. The State submits that the trial court committed no error in not giving the requested special instructions especially in view of the fact that the trial court adequately instructed the jury in its general charge with respect to the law on the credibility of witnesses.

3. Due process of law was not violated by use of an informant's testimony, especially in view of the fact that such testimony was given voluntarily, without promises.

Petitioner's counsel contends that due process of law was violated when the informant testified. Petitioner's counsel contends that the police promised the informant something in exchange for his testimony.

That contention cannot stand since it is not supported by the record. In fact, the contrary is true. The informant, Randle, testified that he wasn't paid for his services nor were any promises made to him when he was originally picked up by the police who suggested this kind of work to him (R. 37-38).

4. Where the evidence in a criminal case sustains the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant.

Petitioner's counsel argues that the motions for directed verdicts should have been granted. Suffice it to say, that in the instant case there was direct evidence to sustain each count. For example, Randle's testimony, that heroin exhibits, as well as the detective's testimony, it would have been error for the trial court to direct a verdict for the petitioner. The jury had all the evidence properly before it and decided to accept Randle's testimony and the State's witnesses over the petitioner's denials on the stand. The credibility of any witnesses is a matter for the jury. It was the judge of the credibility of the witnesses. See *State v. DeHass*, 10 Ohio St. 2d 230 (1967).

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

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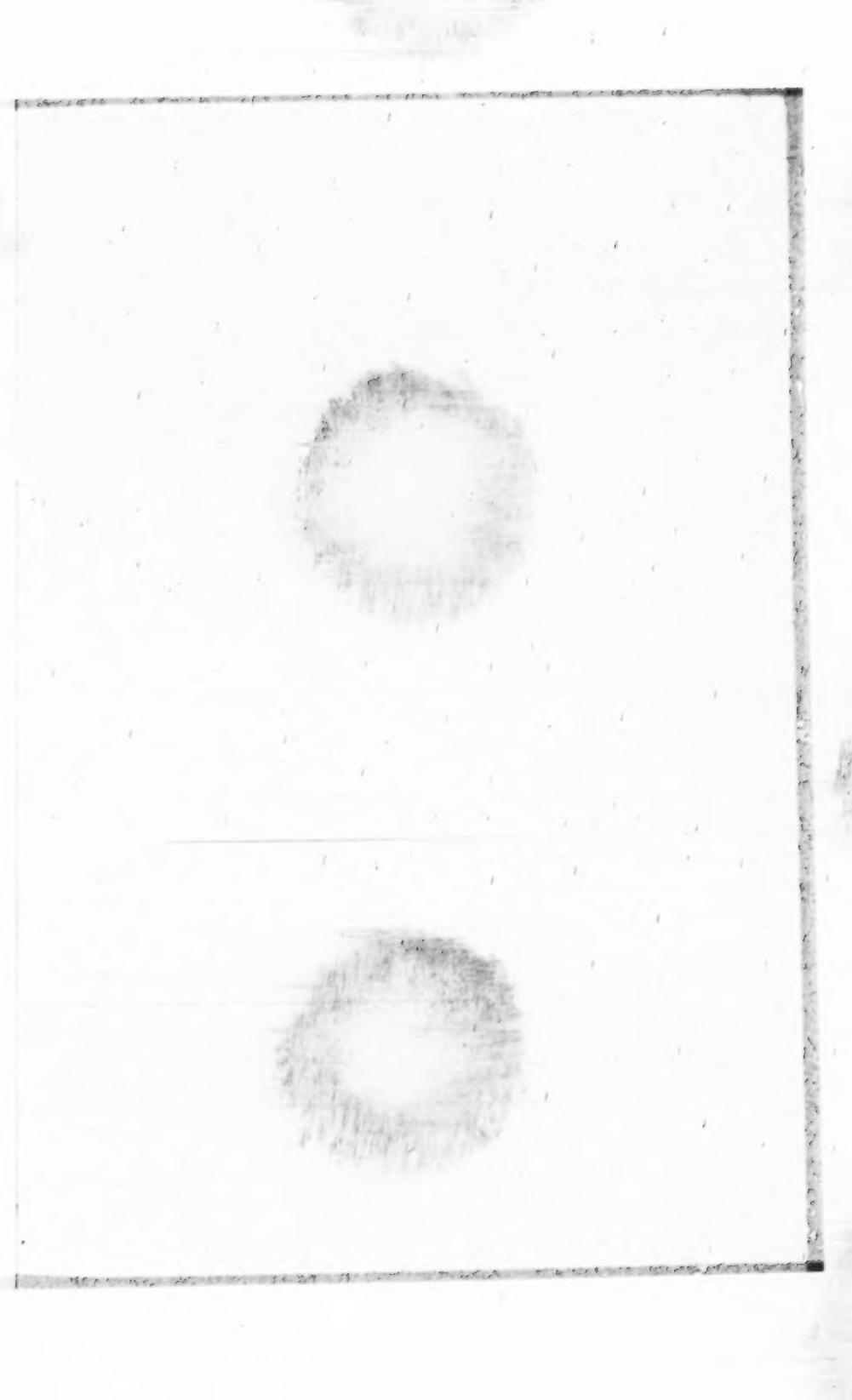

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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ODAK, JR., CLERK

Supreme Court of the United States

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

This Reply has been impelled by certain serious flaws in the *Respondent's Brief in Opposition.*

In the Brief in Opposition, at page 4, it is stated that George Randle, the informer in this case, was a "former heroin addict." If this statement were meant only to convey the idea that Randle viewed himself as such, the statement would still be erroneous. This is so because Randle admitted to using heroin at all times during his participation in the events involved in this case. Not only this, the facts showed he was, by his own admission, an uncured drug addict even as he testified.

As to the statement, also in the Brief in Opposition, that Randle had worked as an "undercover agent" for the past two years (*ibid.*), this statement is not only deceptive but as applied to this case, it is untrue.

Now admittedly, Randle testified this was the fact, but the Record shows this to have been impossible. Here, the Record shows Randle had been arrested on June 29, 1972, on the basis of a June 15, 1972, indictment charging that he had sold heroin to a Cleveland policeman on April 11, 1972. He was arraigned on this charge in July, 1972, and entered a plea of not guilty. Within a month or so after this he propositioned the narcotics detectives for a deal on his own case.

The facts support the inference Randle was told to make a case against Johnson and his (—that is, Randle's) case could be adjusted. Stated another way, he must have been directed to Johnson, for the basic charges here were based on Randle's testimony as to the events that assertedly occurred on August 16, August 18, and September 5, 1972. Randle's indictment was dismissed four days after his very first effort as an informer—that is, on *August 22, 1972*, and only then after he was told the charges therein could be revived (See *Petition for Writ of Certiorari*, pp. 4-5).

Hence, it would only follow that inasmuch as this addict-witness had sought out the police for his deal in August, 1972, it could not have been two years that he had been "an undercover agent" (if in fact that is what he was when he testified) on November 9, 1973. To be sure then, even assuming he was still informing on and/or framing people on this date, it is obvious two years had not expired.

Then there is the statement crediting Randle with having testified he was "no longer using drugs." This

language too falls in the same category as indicated above—it is both deceptive and inaccurate. It is deceptive in the sense that it suggests that Randle's testimony that he was on a methadone program proves he was no longer using heroin, and it is inaccurate in that it fails to recognize methadone as a narcotic drug. On the other hand, the mere fact that Randle had recently enrolled in this type of program does not prove he was a faithful adherent to the program.

II

Other aspects of Respondent's factual narration likewise contain comparable defects. Here what is being referred to is the Respondent's total reliance on the naked assertions by the addict-witness that the person who sold him the contraband was the Petitioner.

As the Respondent views this situation, Randle's testimony should be credited because the officers verified that Randle had been searched before, and was viewed as, he entered the premises where the transactions supposedly took place. And, on *one* of these occasions (August 18) Randle was observed talking to Petitioner. What is being overlooked, we suspect deliberately, is the fact that on each of the occasions Randle entered this restaurant there were a number of other people present, and some of these people engaged Randle in conversation. Not only this, the officer who says he saw Johnson on the premises on August 18, could not credit him (Johnson) with having said anything even remotely relating to a narcotics transaction.

Again referring to Respondent's efforts to show corroboration, we have the statement that, "Detective Zimlich heard Randle ask the Petitioner for a 'half a tea' of heroin" (Respondent's Brief in Opposition, pp. 5-6). To begin with,

the most that can be said for this statement is that Officer Zimlich heard Randle ask for a "half a tea" at a time when he (Zimlich) knew Johnson and others were on the premises. The fact that he could not credit Johnson with having said or done anything in response to this statement, reduces the statement made by Randle to a meaningless utterance.

Then there is the statement, in Respondent's Brief, that Detective Gaughan "was present at all of the controlled purchases" (*ibid.*). Translated, this can only mean Detective Gaughan was in a car parked on a different street from the one where the restaurant was located, and that he could not see what happened inside, nor could he identify any of the participants in the alleged transactions. Any other interpretation on the quoted statement would differ from Gaughan's testimony.

As to the alleged transaction of September 5, 1972, the most that could be said for the alleged corroboration was that Johnson may have been on the premises when, and if, the substance delivered to officers was obtained by the addict-witness.

III

Given then the lack of any corroborating proof that Petitioner was even on the premises on August 16, and corroboration only to the extent that he was in this restaurant with others on August 18 and September 5 (when the other two transactions took place), the most that can be said then is this case depended entirely on the credibility of Johnson as opposed to that of the addict-informer-witness.

Since those who have criminal records (and none was shown here) are vulnerable to a charge that such may

be shown as bearing on their credibility (R. C. of Ohio, §2945.42), it seems quite strange to say an accused is not entitled to be the beneficiary of an instruction focusing upon the credibility of an admitted narcotic addict—especially one who at all times acted for mercenary and ulterior reasons.

IV

Respondent's stated reasons for denying this writ seem to reduce themselves to a plea that a state court should be allowed to convict on general principles. This position they maintain in spite of the fact that the presence of an addict-informer-witness in any case poses a serious problem. This is especially so when his purpose is not only selfish and ulterior, but must be successful lest he suffer a prosecution for his own provable crimes. Given then a witness who is virtually at the mercy of the police, it is most difficult to see how a right sense of justice did not require a credibility instruction that differs from the routine one given in this case.

The above argument aside, Respondent, again by resort to deceptive phraseology, would distort our position. Here Respondent states, "petitioner contends that the trial court should have charged the jury with a cautionary instruction to the effect that the testimony of the State's witnesses was inherently unreliable" (Brief in Opposition, p. 6).

Surely, this Court must know that Petitioner made no such contention. Our position is not that the trial court should have given cautionary instructions with reference to "the testimony of the State's witnesses". Rather, we contended then, and now, that special cautionary instructions should have been given with reference to the testimony of addict-informers, and with reference to testi-

mony from a witness who had received material consideration in exchange for his evidence.

Still another example of this novel pattern of Brief writing is exposed upon analysis of the following reasoning pattern:

> "The trial court gave adequate instructions on the credibility of witnesses. The trial court instructed the jury that they could believe all of the informant's testimony, that they could reject and disbelieve all of the informant's testimony, or that they could accept some parts of the informant's testimony and reject other parts of this testimony." (Brief in Opposition, pp. 6-7).

The blunt fact is that nowhere in the court's charge can this instruction be found. The word informer was not mentioned in the court's charge.

V

Other aspects of the State's arguments against the issuance of this writ, under their contentions Nos. 1 and 2, are fully answered in our Petition. This is especially so in regard to the argument that "counsel had an unrestricted opportunity and, in fact, thoroughly attacked the informant's credibility" (Brief in Opposition, p. 7). The same is true of their reliance on *United States v. Thomas* (*ibid.*).

As was argued in the Petition, the fact is that "[a]n argument to a jury, . . . on a legal issue, unsupported by an instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct." *United States v. Phillips*, 217 F. 2d 435, at 440 (1954).

The argument made by the State in support of its contention No. 3 is likewise premised on distortions. This is so because nowhere in the Petition is the contention made that "due process of law was violated when the informant testified." And, it is a misstatement to say that the Record does not support our contention that Randle received a benefit in exchange for his role in this case.

In our judgment, to argue, as the State does, that a man under indictment for selling drugs to a police officer who sought out the police for a deal received no benefit when his case is dismissed is to take an unrealistic position. For, not only does such an argument disparage reality, it shows more than a mere willingness to have this Court reject our thesis, it mirrors a willingness that the Court even accept their less than accurate evaluation of the Record if no other basis exists for denying review of this case.

As viewed by the defense, the facts show Randle received the payment he sought when he made the deal with the police. The discharge of his case in exchange for his efforts, insofar as this Petitioner was concerned obviously must be deemed the *quid pro quo*.

The facts bearing this out show that this witness' first effort as an informer occurred on August 16, 1972. His second effort was on August 18, 1972. These are two of the dates in this case. Randle's indictment was dismissed on August 22, 1972. Surely one can only conclude there was a relationship between the dismissal and Randle's role as an informant. At the very least, the jury should have been advised as to how to weigh this circumstance. If they concluded such a relationship existed, then Petitioner was entitled to have Randle's testimony deflated by that fact.

CONCLUSION

For all of the reasons herein as well as the reasons set forth in the original Petition for Writ of Certiorari, the review being sought here should be granted this Petitioner.

Respectfully submitted,

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